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In the Supreme Court of the United States

1970

No. [redacted]
276

PETER PARIS,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF THE UNITED STATES

No.

COMMONWEALTH OF PENNSYLVANIA

vs.

PETER PARIS,

Petitioner

PETTTION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Peter Paris prays that a Writ of Certiorari issue to review the judgment of the Superior Court of Pennsylvania.

OPINIONS BELOW

The Opinion of the Court of Quarter Sessions of Washington County, Pennsylvania (A.)* is reported at 49 Washington County Reporter 42. The Opinion of the Superior Court of Pennsylvania (A.) is reported in 264 A. 2d 170, 216 Pa. Superior Ct. 803. The Supreme Court of Pennsylvania denied appeal. The Order is unreported.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under authority of 28 U.S.C. 1257 (3).

The date of the decree sought to be reviewed was March 12, 1970. A Petition for Appeal was filed in the Supreme Court of Pennsylvania on March 30, 1970 at No. 3257A Miscellaneous and denied per curiam without opinion on May 1, 1970.

*"A" refers to the Appendix filed with the Petition for writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. When the same attorneys represent three felony defendants who could be vital and material eyewitnesses for each other, is the failure of said counsel to use, call or make available their two other clients or the information received from them at appellant's trial reversible dual representation within the meaning of the Sixth and Fourteenth Amendments to the Constitution of the United States as interpreted by *Glasser v. U. S.*, 1941, 315 U.S. 60, 70-72, 75 and *Barber v. Page,* 1968, 390 U.S. 719, 722, footnote 1, 90 S. Ct. 1318, 1321, footnote 1?

2. Do the 5th, 6th and 14th Amendments to the Constitution of the United States prevent a trial judge from advising a jury that assertion of defendant's constitutional rights gives him an advantage?

3. Does defendant's privilege against self-incrimination as defined by the 5th and 14th Amendments to the Constitution of the United States bar trying him before the same jury for both forcible and statutory rape because he must testify to the victim's consent to defend against forcible rape and is thus coerced to present personal evidence sufficient to convict himself of statutory rape?

4. Do the 6th and 14th Amendments to the Constitution of the United States permit court instruction on aiding and abetting when defendant is indicted and tried separately as a principal?

5. May a defendant bound over to and indicted by the grand jury for forcible common law rape be convicted

for statutory rape within the meaning of the 6th and 14th Amendments to the Constitution of the United States?

6. Is a judge who discusses any aspect of defendant's case ex-parte with the prosecuting attorney disqualified as trial judge under the 5th, 6th and 14th Amendments to the Constitution of the United States when he refuses to state what occurred and places the burden to show prejudice upon defense counsel who was not there?

7. When alleged sodomy committed by a defendant standing trial for rape is admitted as part of the events surrounding this alleged crime, do the 5th, 6th and 14th Amendments to the Constitution of the United States require that the trial judge, even without request, instruct the jury why this evidence has been admitted and that defendant is not being tried for sodomy?

8. Does placing upon defendant the burden of establishing the bad community repute of the statutory rape victim create an unconstitutional conclusive presumption which is impossible for him to overcome?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES OF PROCEDURE AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his

favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

LAWS OF PENNSYLVANIA

1966 SPECIAL SESSION NO. 3

No. 1

AN ACT **

SB 3

Amending the Act of June 24, 1939 (P. L. 872), entitled "An act to consolidate, amend and revise the penal laws of the Commonwealth," changing the penalty for the crime of rape and assault with intent to ravish.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

** The words in brackets are deleted from the old legislation.

Constitutional Provisions, Statutes, Rules and Regulations Involved

Section 1. Sections 721 and 722, act of June 24, 1939 (P. L. 872), known as "The Penal Code," are amended to read:

Section 721. Rape; *(a)*.—Whoever has unlawful carnal knowledge of a woman, forcibly and against her will, [or whoever, being of the age of sixteen (16) years and upwards, unlawfully and carnally knows and abuses any woman child under the age of sixteen (16) years with or without her consent,] is guilty of rape, a felony, and on conviction, shall be sentenced to pay a fine not exceeding [seven thousand dollars ($7,000), or] *ten thousand dollars ($10,000),* and undergo imprisonment, by separate or solitary confinement at labor [or by simple imprisonment, not exceeding fifteen (15) years, or both.] *for a term the length of which shall be determined by the court but shall not be less than fifteen (15) years or more than life if in the course of the commission of the act, he inflicts serious bodily injury upon anyone. In all other cases he shall be sentenced to pay a fine not exceeding ten thousand dollars ($10,000); or undergo imprisonment by separate or solitary confinement at labor or by simple imprisonment for a term which shall be determined by the court, the maximum of which shall not exceed twenty (20) years, or both.*

As used in this section the term "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any member or organ of the body.

(b) Whoever, being of the age of sixteen (16) years and upwards, unlawfully and carnally knows and abuses

any woman child under the age of sixteen (16) years with her consent, is guilty of statutory rape, a felony, and on conviction, shall be sentenced to pay a fine not exceeding seven thousand dollars ($7,000), or undergo imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding fifteen (15) years or both.

Upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen (16) years, if the jury shall find that such woman child was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of rape, and be convicted of fornication.

Section 722. Assault With Intent To Ravish.—Whoever commits an assault and battery upon a female, with intent, forcibly and against her will, to have unlawful carnal knowledge of her, is guilty of a felony, and on conviction, *for the first offense,* shall be sentenced to pay a fine not exceeding [two thousand dollars ($2,000) or] *seven thousand dollars ($7,000) and* undergo imprisonment, by separate or solitary confinement at labor, not exceeding [five (5)] *fifteen (15)* years [or both] *if in the course of the commission of the act, he inflicts serious bodily injury upon anyone. In all other cases he shall be sentenced to pay a fine not exceeding twenty-five hundred dollars ($2,500), or undergo imprisonment by separate or solitary confinement at labor or by simple imprisonment for not more than seven (7) years or both. For the second offense, or any subsequent offense, he shall be sentenced to pay a fine not exceeding seven thousand dollars ($7,-000) and undergo imprisonment by separate or solitary*

confinement at labor for a term up to a maximum of his natural life.

As used in this section the term "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any member or organ of the body.

Section 2. This act shall take effect immediately.

Approved—The 12th day of May, A.D. 1966.

William W. Scranton

HISTORY OF THE CASE

This appeal involves an acquittal of forcible rape and a conviction of consentual statutory rape on a forcible statutory rape indictment (18 PS 4721) after a trial in Washington County before President Judge Charles G. Sweet and a jury.

On the night of June 14, 1967, fifteen and one-half year old (27a)*** Debra Lynn Snarey met Michael J. Evans (Evans) and Gregg McElhaney (McElhaney) for the first time (32a) in front of a soda fountain (29a, 35a). Evans invited her to a beer party (32a, 33a) and she accepted (36a-37a).

The three then drove in McElhaney's car to a deserted slag dump (38a, 181a) and began drinking. Additional cars and men arrived (39a-40a).[1] Among them were Peter Paris (the present appellant) and Marion Serafin (40a).

Within a short time, many of the males had sexual intercourse with the victim who then left and complained to the police (56a, 164a).[2]

*** "a" refers to the printed record in the state court.

[1] "It seemed like hundreds, but there weren't that many." (40a)

[2] "Saying she has been raped by a gang of boys, white and colored boys." (164a)

The eight defendants who were not subject to Juvenile Court jurisdiction were charged before Alderman James Dalessandro with forcible rape.[3]

At the preliminary hearing conducted by this issuing authority, Paris and Serafin were represented by M. E. Kusturiss, Esquire (Kusturiss) and Michael Joseph Evans by John F. Bell, Esquire (Bell).

These three plus Robert Ray Ragazzini were held for Court. The other boys were discharged.

On September 7, 1967, the grand jury indicted Paris and Ragazzini separately but Evans and Serafin jointly for both common-law and forcible statutory rape as these crimes were defined previous to the May 12, 1966 Amendment (p. 6).

The Paris trial, in which he was represented by Bell and Kusturiss, began October 9, 1967 and terminated October 13, 1967 with a verdict finding him guilty of statutory rape only (323a). Another jury subsequently acquitted of common-law but convicted all other defendants of statutory rape (Opinion, 343a). All defendants filed timely post-conviction motions which the Court listed for March 18, 1968 disposition.

The Federal questions raised in this Petition for Certiorari were presented in the trial court and preserved on

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[3] "Peter Paris 'being then and there over the age of 16 years and upwards, did unlawfully, willfully and feloniously carnally know and abuse one, Debra Lynn Snarey, being then and there a woman child under the age of sixteen years, to wit 15 years, with (or without) her consent, forcibly and against her will.' Violation—Section 721, Act of 1931—rape." (p. 6)

appeal to the Superior Court of Pennsylvania and the Petition for Appeal to the Supreme Court of Pennsylvania.

On January 26, 1968, Allen N. Brunwasser (Brunwasser) mailed a motion to strike the conviction (because of dual and prejudicial representation) to the Court (331a) who, on January 31, 1968, ordered the District Attorney to file such reply as would be deemed appropriate and listed the matter for argument with the other pending motions (338a).

The issue was preserved by appeal to the Superior Court of Pennsylvania and the Petition for Appeal to the Supreme Court of Pennsylvania.

Meanwhile, District Attorney Harold V. Fergus had been elevated to the Washington County Common Pleas Bench and Jess B. Costa sworn on January 1, 1968 to replace him.

Mr. Costa, on February 5, 1968, requested special counsel be appointed because Bell had joined his staff as an assistant District Attorney. His Petition (335a) will acquaint this Court with the counsel conflict problem which existed prior to its presentation.

Arnold W. Hirsch, who had been First Assistant under District Attorney Fergus and chief trial counsel in the Paris case, was designated to process the post-conviction proceedings and, on June 22, 1968, filed an answer to the Paris Motion To Strike (339a). Briefs were presented and argument concluded before Sweet, McCune and Curran, JJ.

The trial judge, on October 1, 1968 and in one opinion, signed only by himself,[4] denied pending motions for a new trial and in arrest of judgment and the motion to strike without ordering an evidentiary hearing.

With the exception of the situation involving dual representation of counsel, the questions raised in this Petition for Certiorari were first raised in the trial court and preserved on appeal to the Superior Court and Petition for Appeal to the Supreme Court of Pennsylvania. The method by which they were raised is included in the questions themselves and will not be specifically detailed here because this would result in duplicity.

On October 11, 1968, Paris was sentenced to a term of two and one-half to six years imprisonment from which punishment he appealed to the Superior Court of Pennsylvania and then to the Supreme Court of Pennsylvania without success.

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[4] This was improper. "Motions for new trials are required by law to be heard by the Court en banc; and it is the duty of all the sitting judges not only to hear the motion, but subsequently to meet together, and discuss and determine the matters presented to them:" "The failure to conform to this practice constitutes reversible error:" *Iacovino v. Caterino et al.*, 336 Pa. 308, 310; *Elliott v. Miller*, 214 A. 2d 351, 206 Pa. Superior Ct. 536 (1965).

REASONS FOR GRANTING THE WRIT

The 6th and 14th Amendments prohibit the same attorney from representing three criminal defendants charged with the same crime because

(a) they cannot be called as witnesses for each other without losing individual tactical advantage plus the protection of the privilege against self-incrimination and

(b) facts obtained from one cannot be used by counsel in the defense of the others without violating the confidential relationship between attorney and client.

The jury was confronted with four problems in its evaluation of the trial evidence: (1) the victim's invitation to take on the entire crowd; (2) the pre-rape events; (3) the rape and sodomy; (4) whether Paris was an aider and abettor to any other not yet on trial participant.

---

(1) The Victim's Invitation To Take on the Entire Crowd

Direct examination by the prosecutor discloses that Paris met the victim while she was sitting with Evans at which time she made offer to have intercourse with everyone present (233a-234a).

> "Q. When was the next time you saw Debbie?
>
> A. Well, walking around and I was walking past Patterson's car and I heard voices inside and I looked in and she was sitting there.

Q. Now, who was sitting in the car?

A. Well, as I looked in I seen, *there was Evans* sitting next to her on the front seat and Ragazzini, I believe, was in the back seat.

Q. All right. And what was she doing when you got inside the car?

A. When I got inside the car?

Q. Yes.

A. Well, I walked around the back of the car and to the other side by the driver's side and as I sat down in the car, she was talking and as I sat down there, I heard her say she was saying to the guys on the other side of the car, I imagine, because she was sitting on the edge of the seat, I heard her say that 'One minute apiece, because I want to be home by 10:30' and then I also heard her say that 'are you going to use rubbers or are you going to pull it out before it happens?' Them guys on the outside of the car yelled, 'Oh, we're going to pull it out.' " (233a-234a) (Emphasis supplied.)

Paris then says he walked around the front of the car and subsequently saw the victim lying alone on the front seat with her legs spread apart (234a-235a). He attempted intercourse (236a) but was unsuccessful because of failure to obtain an erection. He denies any touching of the victim.

"Q. Did you at any time lay your hands on any part of her body as you got in the car?

A. No, sir.

Q. Did your penis at any time touch her body?

A. No, sir." (236a)

Paris denies he ever returned to the car again:

"Q. Did you go back into the car again?

A. No, sir." (237a).

"Q. Mr. Paris, did you at any time have sexual intercourse with Debbie Snarey that night?

A. No, sir.

Q. Did you at any time abuse her physically in any manner?

A. No, sir.

Q. Did any of your body come in oral contact with Debbie . . . let me rephrase that question. Did she at any time handle or come orally in contact with your penis?" (239a-240a)

"A. No, sir.

Q. Did you at any time try to force her to take your penis orally?

A. No, sir." (240a)

On cross-examination, the jury is advised that Mike Evans was a witness (242a):

"Q. Well, *Mike Evans was there, wasn't he?*

A. Yes, sir." (Emphasis supplied.)

It is respectfully suggested that it was error for the trial court to overrule defense counsel's objection (255a) that his re-examination of defendant (which here follows) "leaves the impression that the Court didn't believe his testimony." It also re-emphasizes Evans's presence just before the action began.

"Q. You were at the driver's seat, *Evans was in the middle* and she was on the passenger side?

A. Yes, sir.

Q. You got out of the car and went around the back of the car . . .

A. No, sir, front of the car.

Q. And went around the front of the car and got on the other side. By the time you got over there, Miss Snarey was on her back with one leg up over the seat and one foot or leg down to the side and talking about 'one at a time', and rubbers and things of that sort?

A. No, sir. She said this when I first got in the car to sit down. As I sat down, she was saying, "I'll give younse—' she was talking to the guys that was standing on the other side of the car, she said that I'll give younse one minute apiece, 'cause I want to be home by 10:30.'

Q. *To whom did she make these remarks* about giving them one minute apiece?

A. Well, I imagine to the guys that was standing outside the car *and to Evans.*" (253a-254a) (Emphasis supplied.)

Evans was a necessary witness as to this phase of the case. Although the jury did not find defendant guilty of forcible rape, the credibility of the victim as to whether intercourse, natural or oral, took place was vital to the defense.

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(2) The Pre-Rape Events

Paris arrived with Serafin, Raggazini and Albert Martin (40a, 240a). Martin was never seen again (241a).

Cross-examination of Paris brings out clearly to the jury the friendship of these parties (247a).

"Q. Now, isn't it true that the only real buddies you had there that evening were Raggazini and Serafin?

A. Well, they were my buddies, yes."

"Q. And do you also deny that while you were having, attempting intercourse, Serafin was holding her down?

A. I deny that. I didn't—it never happened." (250a)

Serafin's failure to corroborate his pal could not escape the jury which naturally would draw the fatal inference that his testimony would harm rather than help his friend. *Interstate Circuit, Inc. v. U. S.*, 306 U.S. 208, 226; *U. S. v. DiRe*, 333 U.S. 581, 593; *Griffin v. Cal.*, 1965, 380 U.S. 612, 614, 85 S. Ct. 1229, 1232.

The victim was not certain whether Paris or Serafin were alone or together guilty of pre-rape impropriety. The following testimony will point out the indecisiveness of this witness and show how necessary it was that at least Serafin appear and explain his part in the situation and exonerate defendant if he could.

"Pete Paris and Marion Serafin arrived and came over to her together" (40a); Serafin backed her up against the car (42a); they were getting rude (43a); Paris put his hand over her mouth and was squeezing her neck (44a); said he would break her neck if she didn't stop screaming; they continued to get fresh (44a, 45a); they got on either side of her in the car (47a, 48a).

The victim recollects (48a):

"Q. Now, you say the one had you down. Who had you down?

A. I don't remember whether it was Paris or Serafin.

* * * * * * * *

A. Well, they had their hands over my mouth so I couldn't scream, and then the one put his hand up my dress.

Q. Which one was it?

A. I don't remember whether it was Paris or Serafin."

She additionally testifies (49a) that one of the boys put his hand into her vagina and told her that if she tried to scream he would abuse her and subsequently advised he wanted to have intercourse and when she said "no", pushed her down.

"Q. Do you know which one it was that pushed you down?

A. Paris or Serafin." (50a)

When she discusses her legs being grabbed, being pu ed down and frightened, she is consistent in her inability to identify the actor.

"Q. When you say 'one of them', who do you mean?

A. I don't know whether it was Paris or Serafin.

Q. Was it one of the two of them?

A. Yes." (50a-51a)

---

(3) The Rape and Sodomy

It is apparent that both Serafin and Evans are knowledgable on-the-scene eyewitnesses to the alleged rape and

sodomy. The following testimony makes this clear as the victim tells what happened subsequent to the pre-rape abuse:

"Q. What happened after that?

A. Well, then, he got in the car.

Q. Who got in the car?

A. Paris.

Q. And what did he do?

A. Got on top of me.

Q. What did he do when he got on top of you?

A. Tried to have—started to have intercourse.

Q. How about his clothes? What, if anything, did he do with them?

A. Well, I had my eyes closed and I didn't look.

Q. Did you stop screaming by then?

A. Yes, I was crying then.

Q. You were what?

A. Crying.

Q. Were you consenting to this intercourse he was trying to have?

A. No.

Q. Had you ever had intercourse prior to this?

A. No.

Q. While this was going on, where was *Serafin*?

A. He was out of the car and then Paris said he—said that he couldn't get a hard on and he got up towards the steering wheel where my head was and Paris—*Serafin* came in the car.

Q. Now, when Paris was originally on top of you attempting to have intercourse, did you feel any pain?" (51a-52a)

"A. Yes.

Q. What area of your body was it?

A. In the vaginal, down there.

Q. And you say he went up toward the top of you. What did he do then?

* * * * * * * *

A. He told me to put—to open my mouth and to—

Mr. Hirsch:

Q. What did he do to you?

A. He stuck his penis in my mouth.

Q. And was it Paris that did that?

A. Yes.

Q. Did you resist that?

A. Yes." (52a-53a)

"Q. Was he able to do it?

A. Yes.

Q. *And while he was doing this, what was Serafin doing?*

A. *He was having intercourse.**

Q. And at that time were you feeling anything in the area of your vagina?

A. Yes.

Q. After that what happened?

A. *Then Paris went on top of me and* Serafin came up towards my face and made me do the same thing.*

Q. Why didn't you scream or cry out while this was going on?

A. I couldn't.

Q. Why couldn't you?

---

* The court is asked to take judicial notice that this would be impossible in the front seat of the car.

A. Because his penis was in my mouth.

Q. Were you still afraid as you had been before?

A. Yes.

Q. And what were you afraid of?

A. Dying and what they were doing to me.

Q. All right. Now Paris—on the second occasion, did Paris have intercourse with you?

A. Yes.

Q. And did he penetrate into your vagina?

A. Yes." (53a-54a)

"Q. And what happened after that?

A. *And then they got out and Mike Evans got in.*

Q. Now, Evans is the one whom you originally talked to?

A. Yes.

Q. What did he do?

A. He got on top of me and was having intercourse and he was getting real mad 'cause he said he couldn't get it in and he took my legs and kept on pulling them apart, and he was yelling at me and biting my neck.

Q. *Where was Paris at this time?*

A. *Outside the car.*" (54a) (Emphasis supplied.)

It is interesting to note that neither doctor called by the victim found any evidence of these bites (111a, 141a-142a).

State Trooper Herbert L. Stouffer advises that he investigated the case (167a-168a) and that seven juvenile and eight adult arrests were made (169a). He names them all (168a-169a) and states the seven juvenile cases are still pending but that four adults were discharged at

the office of the Alderman after a hearing (170a). This concludes the State's case (173a).

Defense counsel at side bar both claim surprise that the Commonwealth rested without presenting Serafin, Raggazini and Evans whom it had subpoenaed and asks time to interview these and other witnesses before presenting his side of the case (173a-174a):

> "Mr. Kusturiss: This comes rather as a surprise, Your Honor. I would at this time request of the District Attorney to give me the names and addresses of all witnesses they had subpoenaed to appear here on behalf of the Commonwealth and didn't notify them to appear here today and to give me time to talk to these witnesses. I have stayed away from them and I don't know what their testimony will be.
>
> By the Court: Are there witnesses that you have subpoenaed for the exigency of proof that you have not now called?
>
> Mr. Hirsch: *We subpoenaed the three defendants in the other cases.*
>
> By the Court: *That would be Serafin, Ragazzini and Evans.*
>
> Mr. Hirsch: We subpoenaed 2 more named Patterson, we subpoenaed a young boy named Whitfield.
>
> Mr. Bell: Is he here right now?
>
> Mr. Hirsch: He's been around all day." (Emphasis supplied.)

The side-bar conference ends and the Court advises the jury (176a-177a):

> "Defendant's attorney didn't expect the Commonwealth to rest at this point. He wasn't figuring on

starting today. He has to make an opening argument to start with; *he also indicates he wants to talk to certain witnesses that he thought the Commonwealth was going to call and didn't.* Accordingly, I've agreed to his request that we let you stay over until tomorrow morning for him to start at 9:30 tomorrow morning. Accordingly, we are going to adjourn here in a moment." (Emphasis supplied.)

However, only Gregg McElhaney (178a), Ronald Henderson (203a), Harry Lukich (256a) and Amel Whitfield (261a) are called. McElhaney's case is still pending in the Juvenile Court (169a, 170a, 172a). Ronald Henderson was discharged by Alderman Dalessandro as was Harry Lukich (170a). Whitfield was never prosecuted.

McElhaney indicated that he talked to Kusturiss for the first time the previous night (201a) and that Debbie was advised they were going directly to the slag dump (181a, 193a). Henderson (216a) says that he talked to both Kusturiss and his investigators. Whitfield (261a) advises that he was subpoenaed by the District Attorney and talked to Kusturiss for the first time the day before (262a, 275a). Lukich tells us nothing about when the first contact with defense counsel was made. He does say that he was represented by Mr. DiSalle who, incidentally, is now first Assistant District Attorney under Mr. Costa. (See unprinted letter enclosed with Petition requesting special counsel be appointed.)

It was apparent to everyone on the jury that defense counsel must have talked to all knowledgeable witnesses but did not call Evans and Serafin. Therefore they must have made the permissive inference that the testimony of these people would not back Paris up. In fact, the Court

states while Henderson is being examined, ". . . but I'll tell the jury right now that both the government and the defense have a right and duty to prepare for trial."

Whitfield advises that he knows Serafin (278a) and saw Evans "lying on tep of" the victim (284a).

Kenneth Wilson at the request of the prosecutor, actually went over to where Evans was sitting and pointed him out (294a-295a). The reason given at side bar is ". . . I want him to identify Evans. Evans is under subpoena and should be in the courtroom" (293a).

In a small community who can say whether or not the jurors also knew who Serafin was and saw him present in Court? Without an evidentiary hearing, we cannot tell where he was sitting and if it was next to Evans.

The Court magnified this deficiency in proof by stating that *defendant has "compulsory process to obtain witnesses, . . ."* (301a) that Evans was in the car with Miss Snarey and Paris (310a), by going over Paris's defense including the invitation of Miss Snarey and concludes that "Mr. Whitfield confirmed Mr. Paris's story" (311a).

The jury must have observed that no one else confirmed the story of defendant including Serafin and Evans who would have been the best witnesses.

Paris was tried separately and the other three defendants together (Opinion, 342a). All were convicted of consentual statutory rape and acquitted of forcible rape (Opinion, 343a). The Court summarizes:

> *"Paris and Evans took the stand in their own defense and in separate trials each told very much the same story,* i.e., they mounted the prosecutrix in

the automobile but through failure of erection were unable to achieve either penetration or climax. Serafin and Ragganini did not take the stand and by their pleas of not guilty denied the whole transaction. . . .

Serafin and Ragazzini offered no evidence whatsoever."

Without the aid of Serafin and Evans, the jury had only the conflicting testimony of defendant and the victim to resolve. They apparently did not believe her on the issue of force.

What would have been the result if Serafin and Evans had at least been subpoenaed, sworn, advised of their privilege against self-incrimination in front of the jury by the trial judge and then required to testify until they rightfully claimed the privilege and were then excused. (The trial Judge in his Opinion admits he would have honored this claim of privilege if made.)

Instead of oath against oath, it could have been three against one and Paris acquitted especially if Evans told the same story as Paris. (The lower court opinion recalls that Evans did testify in his own separate trial.)

Although indicted for the same crime as Paris, Evans and Serafin were still available to him as witnesses. If called, the Court would have been required to warn them of their privilege against self-incrimination (*Com. ex rel. Esterline v. Esterline*, 1956, 181 Pa. Superior Ct. 532, 539, 124 A. 2d 133, 137) and instruct the jury both why they could not be required to testify and that no adverse inference could be drawn against Paris because of his inability to force their testimony. *Com. v. Crow*, 1931, 303

Pa. 91, 101 (jointly indicted defendants who were separately tried and convicted but asking for new trial must testify until privilege against self-incrimination properly invoked, if not called "trial judge was not required to instruct the jury they could not be called as such"); 19 PS 681 ("All persons shall be fully competent witnesses in any criminal proceeding before any tribunal"); see also *Com. v. Ferrell*, 1935, 319 Pa. 441, 443; 19 PS 631 ("except defendants actually upon trial in a criminal court, any competent witness may be compelled to testify in any proceeding, civil or criminal; but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to incriminate him; . . ."); Com. v. Francis, 1963, 191 A. 2d 884, 891, 201 Pa. Superior Ct. 313, 325 (persons under indictment for same crime as defendant, available to him as witnesses); *Com. v. Miller*, 1965, 208 A. 2d 867, 205 Pa. Superior Ct. 297.

It was "natural and irresistible" that the uninstructed jury infer that Evans and Serafin would not corroborate Paris especially when a recess was granted to permit defendant to interview them. *Griffin v. Cal.*, 1965, 380 U.S. 612, 614, 85 S. Ct. 1229, 1232; *Com. v. Fusci*, 1935, 117 Pa. Superior Ct. 379, 384 (see 313a for similar "experience in life" charge between trial and Fusci court).

Thus, Evans took the stand in his own case. His testimony would have helped Paris. Counsel for Paris and Evans were identical (Mr. Finder, who represented Evans at trial is the same office associate of Bell who represented him at the preliminary hearing.)

However, presenting evidence as a Paris witness would have given the Commonwealth a preview of his

testimony and given the District Attorney opportunity to better prepare for his coming trial.

How could counsel protect Evans as a witness and still present him as an aid to Paris? How could Bell maneuver Evans' possible claim of incrimination at the Paris trial and still force all nonprivileged testimony from him? How could he argue Evans should talk and at the same time that he could not be forced to?

It is obvious that under Pennsylvania appellate authority that dual representation of Evans and Paris deprived the latter of a knowledgeable eyewitness whose corroborating testimony might have resulted in his acquittal. Com. v. James, 1968, 240 A. 2d 368, 369, 429 Pa. 230, 232 (proof that dual counsel refused to permit one client to testify for another would be reversible error); Com. v. Meehan, 1963, 187 A. 2d 579, 409 Pa. 616 (dissenting opinion of Judge Flood that counsel must be free to make argument even if other defendants hurt adopted).

Serafin did not testify in his own trial. His testimony was vital to Paris. Bell could not call Serafin to help Paris without hurting him. He should have called Paris to help Serafin even though that defendant remained silent at his own trial. The strategies of Serafin and Paris were diametrically opposed. They should not have been represented by the same counsel.

If Serafin were called, he might have given damaging evidence against himself before the Court sustained his claim of privilege. How could Bell require his testimony for Paris and still protect him for his future trial at which he would not testify at all? His appearance for Paris might require a change of strategy in his own defense.

The undenied Petition of District Attorney Costa specifically alleges what should be apparent.

> "In addition, Attorney John F. Bell also discussed the case extensively with the other two defendants, Robert Ray Ragannini and Michael Joseph Evans, and their attorneys." (Paragraph 11)
>
> "Following his taking the office of District Attorney, it was brought to the attention of Jess D. Costa that John F. Bell, one of his assistants, participated in the trial of the defendants, Peter Paris and Marion Joseph Serafin, and had extensively discussed the case with the other defendants, Michael Joseph Evans and Robert Ray Ragannini." (Paragraph 13)

Ethics would foreclose counsel from using the confidences of Evans and Serafin to help Paris and vice versa. Barber v. Page, 1968, 80 S. Ct. 1318, 1321, footnote 1, 390 U.S. 719, 722, fn. 1.

The American Bar Association Canons of Professional Ethics were adopted by our Supreme Court and made effective March 30, 1939 by Pa. R.C.P. 205.

Counsel is required "to present every defense that the law of the land permits" (Canon 5); disclose all conflicts to his client; not disclose his confidences nor accept retainers "from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed" (Canon 6); give his client "entire devotion" and the benefit of his learning and ability with nothing withheld including all remedies and defenses (Canon 15) and to preserve his confidences and refuse conflicting employment without his consent even after

the case is over (Canon 37). *"Within the meaning of this Canon (No. 6), a lawyer represents conflicting interests when on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."*

Dual representation which restricts cross-examination is reversible error without show of prejudice. The trial court should act sua sponte. **Glasser v. U. S.**, 1941, 315 U.S. 60, 70-72, 75. See also *Com. v. Robertson*, 1967, 234 A. 2d 61, 62, 211 Pa. Superior Ct. 79, 80 (if conflict proven, show of prejudice unnecessary; prophylactic rule applies).

The rules of *Com. ex rel. Lucas v. Russell*, 243 A. 2d 184, 212 Pa. Superior Ct. 478, affirmed by a divided Supreme Court November 29, 1968 at 248 A. 2d 37, 432 Pa. 357; *Com. v. Wilson*, 1968, 240 A. 2d 498, 501, 429 Pa. 458, 463, and *Com. v. Resinger*, 1968, 248 A. 2d 55, 432 Pa. 398, do not here apply because there the other jointly-represented defendant was called and did corroborate the now complaining defendant.*

However, here we do have a sacrifice of one client for the other plus the inconsistent position and the neglect which those three cases declare would have been sufficient to obtain reversal (240 A. 2d at 501, 429 Pa. at 463; 248 A. 2d at 56, 432 Pa. at 400).

It is respectfully submitted that this 21 year old defendant (228a) should not be chargeable with the legal sophistication to be aware of and object to this problem which even appeal courts find difficult to apply. See dissenting opinion in *Resinger*, supra, 248 A. 2d at 57, 432

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* But see *Com. v. Small* (decided May 9, 1969), 434 Pa. 497, 254 A. 2d 609, for a 3-3 decision of the Supreme Court on this issue.

Pa. at 403 and in *Lucas*, supra, 248 A. 2d at 38, 432 Pa. at 359.

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(4) The Aiding and Abetting Phase of the Case

Although Paris was not charged with aiding and abetting and had been separately indicted, the Court charged on this element of the case. The constitutional issue raised by this technique is discussed infra, p. 45:

> "If you believe that Peter Paris was an active participant here in the crime of rape and that the victim was forcibly raped, there is evidence to establish his conviction for forcible rape, even if you believe he did not actually rape the victim." (316a)
>
> "For instance, if you believe he used force on her and held her while somebody else did it. There was some testimony of that sort, of his use of force on her. However, she had identified him as the one who raped her first, and the main thrust of the government's case is to direct, forcible rape, not to indirect rape." (317a)

We do not know whether Paris was convicted for being an accessory to 1966 amended statutory rape or a principal, or both.

The swearing in plus testimony of Evans and Serafin up to the point they claimed the privilege against self-incrimination was vital to Paris in his defense against this facet of the case.

Paragraph 7 of Paris's lower court reply brief is adequate answer to that jurist's observation that Kasturias is still on the case (Opinion, 351a).

"Paris did not discharge his trial counsel because he had no money to pay special counsel to prepare the entire argument. He felt that trial counsel still retained the burden of moving for the new trial on trial errors whereas special counsel would argue the question of conflict of interests. He did not have money to pay two lawyers for the same thing. In the event a new trial is granted, he would discharge trial counsel and proceed with special counsel. No prejudice can exist in the argument of a Motion for a new trial because the conflict of interest terminates when the jury brings in its verdict."

It is respectfully suggested that President Judge Sweet, an acknowledged legal scholar, could not have read *U. S. ex rel. Darcy v. Handy*, 3 Cir., 1963, 203 F. 2d 407, and the three law review articles cited in footnote 5 of his opinion (351a) and still rely upon them to support his opinion that only court appointment of counsel protects defendant from the prejudice of dual representation because private retention is not 14th Amendment state action (Opinion, 351a).

The right to counsel in a state prosecution is a Sixth Amendment, not a 14th Amendment, privilege. *Gideon v. Wainwright*, 1963, 372 U.S. 335.

(1) *Handy*, decided ten years before, involved the 14th Amendment right to a trial free from community hysteria plus defense by competent counsel for three defendants who were separately tried. The majority opinion there simply does not support President Judge Sweet when it observed (203 F. 2d at 417):

"Nor should it be deemed to be a pertinent distinction that the defendant's counsel is selected by

himself or by members of his family or his friends *rather than appointed by the Court.*"

The concurring opinion concludes that American Bar Association conflict of interest ethical standards apply to both retained and court-appointed attorneys who are required by the 14th Amendment to give the client complete loyalty (303 F. 2d at 427). "It is the duty both of the trial judge and the prosecutor to see that the essential rights of the defendant are preserved." (*Hendy*, 303 F. 2d at 427, footnote 12); Glasser v. U. S., 1941, 315 U.S. 60, 76 (Court to act sua sponte).

(2) 49 *Virginia Law Review* 1531, although more concerned with effectiveness of counsel, criticizes the state action rule (p. 1535), observes that the Courts are equivocal in applying it (p. 1531), advises that the attorney must bring the problem to the attention of the trial court but that a court of appeals can reverse regardless if the conflict exists (p. 1546), discusses the rationale of the conflicting decisions but rejects the idea of client responsibility for his lawyer agent due to inability of the former to make an educated choice and decision until it is too late (p. 1552) and concludes that the old 14th Amendment rule has been superseded by the Sixth Amendment right under *Gideon v. Wainwright*, which has substituted a "fair trial" test applied to both federal and state defendants (p. 1556).

(3) 78 *Harvard Law Review* 1434 concludes that *Gideon v. Wainwright* has substituted a Sixth Amendment "fair trial" right for the old 14th Amendment "special circumstances" test of *Betts v. Brady* and the 14th Amendment state action standard of *Hendy* (p. 1447) and criticizes the appointed vs. retained decisions.

(4) 59 *Northwestern Law Review* 289 (1965) is both critical of the retained vs. appointed line of cases and observes that they have been either relaxed (p. 296), rejected (pp. 300, 334-335), or given only lip service (p. 301) subsequent to which the appeals court reviews the record to determine if defendant received a fair trial (p. 303).

Even if Serafin and Paris were material witnesses and not defendants, counsel would still have a conflict problem, but Paris required to show prejudice (59 NLR 335) which showing he believes he has made.

The trial judge knew of this problem from the motions pending before him plus his ex parte examination of the trial list (44a, 45a). He took no steps to correct it. Surely, 21 year old Paris (228a) should not be held responsible.

No one likes to turn down an additional fee for trying the same case. Only a severe prophylactic rule will encourage trial courts to enforce this conflict idea and deter joint representation at its inception with the sanction for failure appellate reversal.

The issues discussed in this question were raised in the trial court by a Motion to strike the conviction and preserved on appeal to the Superior and Supreme Courts of Pennsylvania.

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2. What is the purpose of giving defendant constitutional rights if the trial judges advises the jury that asserting them gives him an advantage?

This issue was raised at trial, preserved by New Trial Motion Point No. 26 and in the appeals to the Superior and Supreme Courts of Pennsylvania.

The lower court instructs the jury that defendant has "a very considerable advantage here" (301a) when he asserts his constitutional rights. Obviously, he had no advantage at all. The Constitution only requires the Commonwealth prove its case without defendant's assistance.

This type of comment should be condemned as quickly as was reference to defendant not taking the stand in *Griffin v. Cal.*, 85 S. Ct. 1229, 380 U.S. 609.

By making this comment, the court gave defendant his rights and then took them away by an unfair argument. *Com. v. Didio*, 212 Pa. Superior Ct. 51, 58, 239 A. 2d 883, 886 (Ct. gives lip service to corrupt testimony of accomplice requirement); *Com. v. Towber*, 152 A. 2d 917, 919, 190 Pa. Superior Ct. 93, 97 (reversible error for Court to ask jury determine motive of defendant in claiming privilege against self-incrimination when confronted by incriminating statement of another defendant.)

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3. It is respectfully submitted that defendant's privilege against self-incrimination under the 5th and 14th Amendments to the Constitution of the United States prevents trying him before the same jury for both forcible and statutory rape because he must testify to the victim's consent to defend against forcible rape and is thus coerced to present personal evidence sufficient to convict himself of statutory rape.

Defendant objected to trial on forcible and statutory rape at the same time (22a). His motions were unsuccess-

ful (23a). The issue was preserved by new trial points 2, 11 and 28 (328a, 329a, 330a).

Passing over the question of improper amendment of the indictment, the Court advised the jury that forcible rape is "against her will" and statutory rape is "with her consent" (305a).

Paris's defense was the victim's consent to his attempt at intercourse which was frustrated by failure to have an erection (234a-236a).

He was the only witness who could say that the victim agreed when we come right down to it. Failure to give this information made conviction on the more serious common-law rape count almost certain.

To defend, he was required to admit his presence at the scene and the attempt which alone was sufficient to sustain a verdict of attempted statutory rape or statutory rape if the jury did not believe he failed.

A. In all cases where trial for both statutory and common-law rape was approved, the defendant was convicted of both crimes. Since he received only one sentence, he had no ground for complaint. *Com. v. Cox*, 1967, 209 Pa. Superior Ct. 457, 228 A. 2d 30 (a 1964 offense); *Com. v. Garybush*, 1948, 12 Fayette 47; *Com. v. Samyan*, 1933, Montgomery County, 21 D. & C. 401.

No case has been discovered approving this idea where defendant was acquitted on either charge or where the offense occurred subsequent to the May 12, 1966 amendment.

As *Cox* observes (footnote 2), consent was no defense when the victim was under 16. Thus, no one could or did raise the privilege against self-incrimination problem pre-

vious to the 1966 amendment and research has disclosed no one who has done so as of this date.

The trial judge recognized the problem and unknowingly overruled *Cox* (228 A. 2d at 35, 209 Pa. Superior Ct. at 467) by directing the jury "You can't find him guilty of both" (312a). If he was wrong, the matter should at least be remanded to permit him to decide if a new trial should be granted because of his misconception of the law. *Com. v. Moon*, 1955, 383 Pa. 18, 29, 117 A. 2d 96, 102 (lower court misconstrues 1951 Mental Health Act, case remanded to give him opportunity to decide under correct standard).

The lower court's reliance on *In re Lane*, 135 U.S. 443, 448, is misplaced. Although defendant was there charged with common-law and statutory rape, the trial judge deleted the elements of force from the indictment and charged only on statutory rape for which defendant was convicted.

Since the State court had jurisdiction of both defendant plus the crimes, federal habeas corpus was held to be an improper remedy especially when defendant understood the charges and did not even ask the District Attorney to choose one or the other before the trial began.

The legislature has declared common-law and statutory rape to be different both in their elements and penalties. Defendant should be charged with the specific rather than the general crime. *Com. v. Buzak et al.*, 1962, 197 Pa. Superior Ct. 514, 518, 179 A. 2d 248. (Unemployment Compensation Act defines false pretense under Act; prosecution for Penal Code false pretense improper.)

B. Joining inconsistent counts of common-law and statutory rape forces defendant to choose between waiving

his privilege against self-incrimination and testifying to consent or risking almost certain common-law rape conviction if he does not.

Any type of procedure which makes attractive waiver of a constitutional right and, in particular, the privilege against self-incrimination, has been held reversible error. **U. S. v. Jackson,** 1968, 88 S. Ct. 1209, 1211, 1216, 390 U.S. 570, 572, 581-582 (unconstitutional to require defendant waive jury trial in order to escape possibility of death penalty); *Garrity v. N. J.*, 1967, 87 S. Ct. 616, 619, 385 U.S. 493, 498 (police officers asserting privilege discharged); *Spevak v. Klein*, 87 S. Ct. 625, 628, 385 U.S. 511, 515 (attorney claiming privilege in judicial inquiry disbarred); *Griffin v. Cal.*, 380 U.S. 609, 85 S. Ct. 1229 (sanction making assertion of 5th amendment privilege "costly" unconstitutional); *U. S. v. Green*, 1957, 355 U.S. 184 (defendant acquitted of first degree but convicted of second degree murder; unconstitutional to retry him on first degree murder at price of obtaining a new trial on second degree conviction); *NLRB v. Industrial Union of Marine Ship Building Workers of America, etc.* (1968), 88 S. Ct. 1717, 1722, 391 U.S. 418, 425 (chilling effect of making defense procedure choice held unconstitutional).

Stevick v. Com., 1875, 78 Pa. 460, held joinder of rape and assault and battery with intent to ravish proper but forecast an opposite decision if "the offenses are *repugnant* in their nature and legal incidents, and the trial and judgment are so incongruous as to tend to deprive the defendant of some legal advantage" (78 Pa. at 468) or "where two offenses are charged, where the defendant can make it appear that this mode of proceeding would subject him to unreasonable difficulty or embarrassment on his trial, the courts have it in their power to protect

him by quashing the indictment or compelling the prosecutor to elect on which count he will proceed or discharge the defendant from the other" (78 Pa. at 464).

The United States Supreme Court at 89 S. Ct. 488 on December 16, 1968 granted certiorari in *Maxwell v. Bishop*, 398 F. 2d 138 (D.C. Cir.), to decide the question "whether Arkansas' single-verdict procedure which requires the jury to determine guilt and punishment simultaneously and a defendant to choose between presenting mitigating evidence on the punishment issue or maintaining his privilege against self-incrimination, on the guilt issue, violates the 5th and 14th Amendments." It is respectfully suggested that a defendant decision in *Maxwell* would require reversal in *Paris*.

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4. It is respectfully submitted that the 6th and 14th Amendments do not permit Court instruction on aiding and abetting when defendant is indicted and tried separately as a principal.

This point was preserved on appeal to the Superior and Supreme Courts of Pennsylvania.

The grand jury indicted defendant separately as a principal. Nowhere is he warned that the Court would charge on aiding and abetting at the very end of a trial (316a-317a) in which other defendants were not participants.

The conviction cannot go beyond the specific charge of the indictment. *Garner v. La.*, 368 U.S. 157, 168; **Appeal of Gault**, 1967, 87 S. Ct. 1428, 1446, 387 U.S. 1, 33 (notice of charges must be given sufficiently in advance

of trial to permit adequate preparation).

Aider and abetter and principal are separate offenses. **U. S. v. Pereria**, 314 U.S. 1, 11. Whether or not defendant indicted as a principal can be held to answer as aider and abetter without a specific charge in the indictment has been left open by the United States Supreme Court. *U. S. v. Price*, 1966, 86 S. Ct. 1152, 1158, 383 U.S. 787, 796.

Since this instruction came at the very end of the trial, it required special care since the jury would remember it best. *Bollenback v. U. S.*, 1946, 326 U.S. 607, 611, 614; **Com. v. Berkenbush**, 1920, 267 Pa. 455, 460.

We cannot really know whether or not defendant was convicted as an aider or abetter to statutory rape or as a principal. It is suggested that this error is fundamental and sufficient alone for a new trial.

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5. It is respectfully submitted that a defendant bound over to and indicted by the grand jury for forcible common law rape cannot be convicted of statutory rape within the meaning of the 6th and 14th Amendments to the Constitution of the United States.

This issue was preserved by pre-trial motion, at trial, in the Motion for a new trial and preserved on appeal in the Superior Court and in the Supreme Court of Pennsylvania.

"The issues at trial in all court cases shall be defined by the indictment." *Pa. R. Crim. Pro.*, p. 213(a).

1. Common-law rape required force. The woman's consent was a complete defense unless she was under ten

years of age in which event she was conclusively presumed to be incapable of giving it if under seven, but only rebuttably presumed to be incapable if between seven and nine.

The Act of May 19, 1887, P. L. 128, §1 (reenacted in 1939, 18 PS 4721, with an increase in penalty only) expanded inability to consent.[5]

Although called "statutory rape" by Bench and Bar and held not to be an included offense of common-law rape, it was not so named in the statute.

Although the legislature applied the identical range of punishment for both crimes, consentual rape was punished less severly the nearer the victim approached the cut-off age of 16. *Com. v. Exler*, 1914, 243 Pa. 155, 159, 161; *Com. v. Exler*, 1915, 61 Pa. Superior Ct. 423; *Com. v. Bowes*, 1955, 166 Pa. Superior Ct. 625; *Com. v. Wink*, 1951, 170 Pa. Superior Ct. 96, 120; *Com. v. Nadolny*,

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[5] "Whoever has unlawful carnal knowledge of a woman, forcibly and against her will, or whoever, being of the age of sixteen (16) years and upwards, unlawfully and carnally knows and abuses any woman child under the age of sixteen (16) years, with or without her consent, is guilty of rape, a felony, and on conviction, shall be sentenced to pay a fine not exceeding seven thousand dollars ($7,000), or undergo imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding fifteen (15) years, or both.

Upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen (16) years, if the jury shall find that such woman child was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of rape, and be convicted of fornication. 1939, June 24, P. L. 872, Sec. 721."

1949, 163 Pa. Superior Ct. 517, 519; *Com. v. Shrodes*, 1946, 354 Pa. 70, 71.

2. The Act of May 12, 1966 (18 PS 4721, Pocket-parts) placed common-law and statutory rape in different paragraphs, revoked the old reference to the 16 year old victim, redefined both crimes, created separate penalties for each and, for the first time, named the new offense "statutory rape".[6]

3. Before the preliminary hearing began and in order to clear up the ambiguity of the information[7] counsel asked whether the charge was common-law or statutory rape. He was advised by the District Attorney himself that the Commonwealth theory was forcible common-law rape.

> "For the record, before we waive the reading, I believe we had a talk with the District Attorney wherein he was going to state for the record a clear position as to what he intended to prove here and what the charges actually are.
>
> Mr. Fergus: It is the Commonwealth's contention and we will attempt to prove forcible rape. We are also mindful of the fact that the charges made would include lesser offenses to be found by a jury and have no right to change what a jury might do. The lesser offenses could be statutory rape, assault or assault with intent to ravish, but it is the Commonwealth's intention today to offer evidence which we feel is a prima facie case on forcible rape.

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[6] (See page 6 of this petition.)

[7] (5a, 9a)

> **Mr. McIlvaine: At this time for the record I would like to take issue with the District Attorney that statutory rape is a lesser offense under the Code. . ." (9a)**

Consistent with his position before the Alderman, the prosecutor presented a common-law rape indictment to the grand jury which approved it.[8]

Although containing two counts, the indictment charges only forcible common-law rape. When an under 16 year old victim submits to force, the crime is both common-law and statutory rape. Com. v. Cox, 1967, 209 Pa. Superior Ct. 457, 467, 228 A. 2d 30, 35, footnote 2. Therefore, the prosecutor was correct that the crime of forcible rape could be statutory rape also when the victim was under 16. However, this did not put defendant on notice that he might be charged with the 1966 type of statutory rape which now requires consent.

4. When the Court amended the first count by deleting the words "without her consent", the picture did not change. Defendant was still charged only with two counts of common-law rape, the former for a girl under 16 and the latter for using force generally.

The words "force and arms" in Count One covered lack of consent without specific use of that phrase. Com. v. Carpenter, 1953, 172 Pa. Superior Ct. 271. Thus, defendant was indicted for forcible rape and convicted of consentual rape. The conviction cannot stand. Com. v. Ashmore, 1956, 8 D. & C. 523 (conviction of statutory rape on common-law rape indictment reversed sua sponte);

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[8] (10a-11a)

U. S. v. Russell, 369 U.S. 749; *U. S. v. Roach*, 1963, 3 Cir., 321 F. 2d 1 (count in indictment does not contain necessary word "knew"; court charges defendant can be guilty on all counts; fundamental error to permit jury to deliberate on defective count even without request for instructions); *Cole v. Arkansas*, 333 U.S. 196 (1947).

5. By paragraph (a), the crime of statutory rape, as it then existed, together with the phrase "with or without her consent" were completely repealed by enclosing them in brackets. **Com. v. Hallberg**, 1953, 374 Pa. 554, 559 (Pennsylvania Constitution, Article 3, §6, plus 46 PS 581 require abrogated words be enclosed in brackets).

Paragraph (b) then created a new crime of statutory rape which prohibited carnal knowledge of a woman under 16 "with her consent".

Fornication, as previously, requires consent plus bad repute of the victim.

Common-law rape has been returned to its pre-1887 status. It covers only forcible rape plus carnal knowledge of a woman under ten. Such knowledge of a woman between ten and sixteen is now common-law rape without her consent and statutory rape with her consent.

If defendant had been convicted of either common-law or statutory rape as it existed previous to the 1966 amendment, a new trial is mandatory. **U. S. v. Smith**, 1956, 3 Cir., 232 F. 2d 570 (crime not to place stamp on liquor repealed; tearing of stamp now required; conviction on repealed law reversed even though sufficient guilt thereunder proved).

It is apparent that defendant cannot be charged with common-law rape by force of a girl under 16 and con-

victed of statutory rape "with her consent" when he has neither been bound over to nor indicted by the grand jury on this crime.

It is suggested that the trial judge had no authority to allow amendment to the indictment at trial and that even if he did, he should have declared a mistrial because of genuine surprise caused by this change in attack by the prosecution.

This problem is preserved by post-conviction motions Nos. 1, 2, 4, 11, 12, 13, 21, 22 and 28 and preserved on appeal to the Superior and Supreme Courts of Pennsylvania.

Article 1, §10 of the Pennsylvania Constitution directs, "No person shall, for any indictable offense, be proceeded against criminally by information, . . ." As rape is certainly an indictable offense, the Court was without authority to change the charge without resubmitting the question to the grand jury. *U. S. v. Russell*, 369 U.S. 749, 770; *Stirone v. U. S.*, 361 U.S. 212; Com. v. Cohen et al., 1964, 199 A. 2d 139, 145, 203 Pa. Superior Ct. 34, 43.

It is respectfully submitted that the indictment did not charge statutory rape substantially in the language of the Act of Assembly prohibiting it as required by *Pa. R. Crim. Pro.*, p. 213, and further that the defect was a matter of substance and not form so that the amendment charged not only a different offense but required a continuance under the specific provisions of *Pa. R. Crim. Pro.*, p. 220.[9]

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[9] "The court may allow an indictment to be amended where there is a defect in form, the description of the offense, the description of any person or any property, or the date charged pro-

A. The indictment, as amended, after the court deleted "without her consent" did not change the charge. Defendant still went to trial on a specific charge of forcible rape. The error was in the Court charging on consent when defendant had not been indicted on this theory.

The trial judge would have been correct in observing (19a). "The district attorney doesn't have to prove the presence of consent in order to make out the presence of statutory rape" if he were discussing the pre-1966 situation. He would have also been correct if he did not charge on consent and statutory rape but only advised the jury that if they found consent, they must find defendant not guilty as indicted.

His entire discussion of consent deals with lowering the offense to statutory rape as defined by the 1966 amendment even though defendant was not charged with this (304a-306a, 307a, 312a, 313a). Additionally, the Court gave no instruction concerning inability of a woman under 10 or under 16 to consent. The charge was thus defective in this aspect.

> **"Whoever has unlawful carnal knowledge of a woman, forciby and against her will, is guilty of rape." (304a)**
>
> **"Whoever being of the age of 16 years and upwards, unlawfully and carnally knows and abuses any woman child under the age of 16 years *with her consent* is guilty of statutory rape." (305a)**

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vided the indictment as amended does not charge an additional or different offense. Upon amendment the court may grant such a postponement of trial or other relief as is necessary in the interests of justice."

> "If you believe that he had intercourse with her *but that she consented voluntarily* to have sexual intercourse with him, then you can find him guilty of statutory rape. You can't find him guilty of both." (312a)

As the Court points out in footnote 3 of his Opinion (347a), the jury is presumed to follow his instructions. See also *Spencer v. Texas,* 87 S. Ct. 648, 653, 385 U.S. 554, 562. It is thus apparent that if the jury followed the Court's instructions they found no force but consent. They have thus convicted defendant of something for which he was not indicted and for which default the Court could not grant an amendment.

The indictment as amended did not charge the crime of 1966 statutory rape. Defendant has been convicted on an indictment for statutory rape which did not charge a crime. *U. S. v. Kessler,* 3 Cir., 213 F. 2d 53, 56.

Defendant was aware that the indictment was defective. Both in his pre-trial motion presented September 5, 1967 and denied October 5, 1967 and resubmitted (17a-18a) before the jury was sworn and again denied he stated that statutory rape cannot be "without her consent".

He also claimed that he had not been given a hearing on statutory rape at the issuing authority level. Obviously, consent could not have been proved there without the testimony of Miss Snarey at which point defendant could begin to develop evidence of her reputation on cross-examination. Mr. Bell observes, "We have never had a preliminary hearing on statutory rape" (23a).

Bad reputation is no defense to forcible rape. Just before trial began, defendant was advised by the Court that he must also defend against 1966 amendment statutory rape to which a defense would be bad repute. Obviously, bad repute is no defense if force is claimed. The Court rules:

> "I think I'm going to permit the District Attorney's amendment and grant an exception for the prisoners here." (21a)

Defendant responds (22a):

> ". . . we are entitled to a continuance to prepare for a defense on statutory rape. In the squire's office, the transcript specifically stated that he was proceeding on the charge of forcible rape. They are both inconsistent crimes, rape and statutory rape being inconsistent and requiring different defenses."

"Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" "The 'initial hearing' in the present case was a hearing on the merits. Notice at that time was not timely; . . ." **Application of Gault**, 387 U.S. 1, 33, 87 S. Ct. 1428, 1446 (1967).

Although the trial court is correct in his Opinion (348a-350a) that defendant had from June 14, 1967 until October 9 of that year to prepare, he is incorrect in regard to getting ready for the amended indictment for which he was given no time at all. Defense demurs (175a) at the close of the Commonwealth's case "for the reason stated in Chambers earlier, that the indictment as amended

fails to allege an offense and the element of consent required by the statute is not proven by the Commonwealth". The Court's response "statutory rape is still a lesser included count of rape" does not meet the issue.

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6. Although evidence of the alleged sodomy was properly admitted as part of the background to the alleged crime, the trial court did not properly protect defendant as required by the 5th Amendment by advising why the evidence was admitted and did not properly admonish them that defendant was not being tried for sodomy.

This issue was raised by defendant's lower court motion to strike the conviction and preserved on appeal to the Superior and Supreme Courts of Pennsylvania. In describing the events before and after the alleged rape, the victim advises the jury that Paris forcibly "stuck his penis in my mouth" (52a) and that Serafin "made me do the same thing" (53a).

The lower court defined rape as "carnal knowledge" (305a, 306a) or "carnally knows or abuses . . ." (305a), "unlawful sexual intercourse" (305a) "unlawful consentual intercourse . . ." (306a).

Nowhere is the oral sex distinguished from the vaginal. The Court recalls defendant's "sexual intercourse", the victim's wrenched neck (308a) and charges, "if you believe that he had *intercourse*", "sexual intercourse", etc. (312a, 314a) he can be guilty and concludes (312a-313a). "If you believe that he did not have *intercourse* with her, that is to say, if you have not been con-

vinced beyond a reasonable doubt of proposition one or proposition two, and therefore have not been convinced that he had intercourse with her *one way or the other*, then you would acquit him." (Emphasis supplied.)

The Random House Dictionary of the English Language (p. 225) defines "carnal" as inter alia, "pertaining to or characterized by the flesh or the body, its passions and appetites; sensual: Fleshy, bodily, animal, lustful, lecherous, lascivious, libidinous, concupiscent."

"Carnal abuse" "Law. Any lascivious contact with the sexual organs of a child by an adult, esp. contact *not* involving sexual intercourse. Rape, esp. of a young girl."

"Carnal knowledge, chiefly law. Sexual intercourse."

"Intercourse". "Sexual relations or a sexual coupling, esp. coitus" (p. 740).

With no instruction as to why the oral intercourse was admitted, the average juror certainly could believe it was included in the offense. Why would it have been brought to their attention otherwise if this were not so? The words "one way or another" were at least confusing in this setting.

When evidence of other uncharged crimes is admitted for even a proper purpose, failure to give limiting instructions even without request is reversible error. **Com. v. Wright**, 1964, 415 Pa. 55, 60-61, 202 A. 2d 79, 81; *Com. v. Kline*, 1949, 361 Pa. 434, 439, citing *Com. v. Lipschutz*, 89 Pa. Superior Ct. 142. See *Com. v. Scoleri*, 1968, 245 A. 2d 295, 299, 432 Pa. 571, 580, where limiting instructions were given and where the problem is discussed and *Com. v. Williams*, 1968, 248 A. 2d 301, 305, 432 Pa. 557,

564 (erroneous charge on reasonable doubt can be raised sua sponte by appeal court).

It is respectfully suggested that *Michelson v. U. S.*, 335 U.S. 469, 475 would require that this general situation be branded 14th Amendment reversible error.

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7. When the lower court discussed defendant's case ex parte with the prosecuting attorney, he should have disqualified himself upon motion as trial judge especially when he refused to state what occurred and placed the burden to show prejudice on defense counsel who was not there.

Defense discovered that the trial judge had met ex parte with the prosecutor (13a-17a). He asked this jurist to disqualify himself. The answer was no (14a). The issue was preserved in the new trial motion by Objection No. 5 (328a) and preserved on appeal to the Superior and Supreme Courts of Pennsylvania.

It is apparent that at least pending motions which would delay the trial were involved (15a-16a).

> "Mr. Kusturiss: It has come to the attention of counsel for defendant that the District Attorney's Office had a conference with the Honorable Judge Sweet on Thursday with reference to this case and without defense counsel being advised of this meeting. A certain order dated the 5th day of October 1967 was made by the Court. For this reason, we move that the Court disqualify itself to hear the case

and ask that the case be continued until the next term of court." (13a)

"Mr. Hirsch: Keep in mind we are very much interested in knowing the determination of the motions at that time. Had those motions not been determined, the trial would have been delayed." (15a)

"Mr. Fergus: . . . it was a procedural meeting as has been described by both Mr. Townsend and for the purposes that were discussed by Mr. Hirsch." (16a)

"Mr. Townsend: . . . I told him that we had met with the President Judge of the Court that morning and he had informed us that he would hand down an Order that afternoon and that he had not told us whether or not he would grant or deny the motions." (15a)

The Court refused to reveal what had taken place or even state it was not prejudicial and challenged defense counsel to come forward with evidence everyone knew he could not present. "Now, if you have any proof as to what was discussed in here with me by any person, I would like to hear it." (13a-14a)

"How did you know what, if anything, Mr. Fergus and I talked about?" (14a)

"Unless you have some evidence that something out of line was said, I'm not going to sustain the motion." (14a)

". . . but to suggest there is some impropriety in the scheduling of business and that I have to invite

every one of 160 defense counsel in the room every time the District Attorney comes in here is just going too far." (17a)

Even if we pass over defendant's state and federal constitutional right to be present or represented at every stage of the proceeding, the appearance of impartiality required by **Commonwealth Coatings Corp., Inc., etc. v. Continental Casualty Co.**, 1968, 89 S. Ct. 337, 339-40, 393 U.S. 8, is missing.

Also, "The ordinary rule, based on considerations of fairness, did not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Campbell v. U. S.*, 1960, 365 U.S. 85, 96.

Defendant did not and could not know what took place between Court and prosecutor. Neither would enlighten him nor say he was not harmed. The pending motions were dismissed almost immediately thereafter and the trial in which defendant claims the Court was partial to the Commonwealth (new trial motion, 329a), began. The Court is asked to take judicial notice that the call of the trial list both in civil and criminal cases is usually conducted in open court.

If the prosecutor wanted to discuss the trial date or motions which had been argued before the court en banc (18a), he should have notified his opponent and thus would have avoided the present unpleasant and embarrassing necessity for counsel to raise problem.

8. It is respectfully suggested that placing upon defendant the burden of establishing the bad community repute of the statutory rape victim creates an unconstitutional conclusive presumption which is impossible for him to overcome all in violation of the 5th and 14th Amendments to the Constitution of the United States.

This issue is preserved in the new trial motion point 27 and preserved on appeal to the Superior and Supreme Courts of Pennsylvania.

The Commonwealth was not required to permit any defense to statutory rape, but it did. The rules of due process then apply. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1958).

Defendant could not truthfully present evidence of the victim's community bad repute because her wrongful acts would not be publicly performed. (**Bowles v. Pechersky**, W.D. Pa., 64 Fed. Supp. 641, 645) and would be known only to family and intimate friends who would not volunteer this information to a stranger from another town (**Morrison v. Cal.**, 1933, 291 U.S. 82, 88).

The burden requires defendant rebut a conclusive presumption "incapable of being overcome" (*Carrington v. Rash*, 1965, 380 U.S. 89, 96, 85 S. Ct. 775, 780) and requires him to produce evidence "peculiarly within the knowledge of his adversary." **Campbell v. U. S.**, 1960, 365 U.S. 85, 96.

The jury can convict him on the presumption even if he is fortunate enough to obtain the bad reputation evidence required: *Bailey v. Ala.*, 1910, 219 U.S. 219, 234.

On balance, the aid given to the Commonwealth by this presumption subjects the accused to the hardship and oppression condemned in **Morrison** (291 U.S. at 88) and should be treated in similar fashion here.

CONCLUSION

A fair trial is guaranteed to both the innocent and the guilty. A close issue of credibility magnifies the weight of trial error. *U. S. v. Glasser*, 1941, 315 U.S. 60, 67.

It is respectfully suggested that justice demands a reversal of this conviction and the granting of a new trial at which the objections presented in this Petition can be remedied.

Respectfully submitted,
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